

(b) If the respondent to a disciplinary proceeding fails to appear at the hearing after a notice of hearing has been given by the administrative law judge, the administrative law judge may deem the respondent to have waived the right to a hearing and may proceed with the hearing in the absence of the respondent.

(c) A hearing under this section will not be open to the public except that the Director may grant a request by a respondent to open his or her hearing to the public and make the record of the disciplinary proceeding available for public inspection, *provided*, Agreement is reached in advance to exclude from public disclosure information which is privileged or confidential under applicable laws or regulations. If a disciplinary proceeding results in disciplinary action against a practitioner, and subject to §10.159(c), the record of the entire disciplinary proceeding, including any settlement agreement, will be available for public inspection.

§ 10.145 Proof; variance; amendment of pleadings.

In case of a variance between the evidence and the allegations in a complaint, answer, or reply, if any, the administrative law judge may order or authorize amendment of the complaint, answer, or reply to conform to the evidence. Any party who would otherwise be prejudiced by the amendment will be given reasonable opportunity to meet the allegations in the complaint, answer, or reply, as amended, and the administrative law judge shall make findings on any issue presented by the complaint, answer, or reply as amended.

§§ 10.146–10.148 [Reserved]

§ 10.149 Burden of proof.

In a disciplinary proceeding, the Director shall have the burden of proving his or her case by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

§ 10.150 Evidence.

(a) *Rules of evidence.* The rules of evidence prevailing in courts of law and

equity are not controlling in hearings in disciplinary proceedings. However, the administrative law judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* Depositions of witnesses taken pursuant to §10.151 may be admitted as evidence.

(c) *Government documents.* Official documents, records, and papers of the Office are admissible without extrinsic evidence of authenticity. These documents, records and papers may be evidenced by a copy certified as correct by an employee of the Office.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the administrative law judge may authorize the withdrawal of the exhibit subject to any conditions the administrative law judge deems appropriate.

(e) *Objections.* Objections to evidence will be in short form, stating the grounds of objection. Objections and rulings on objections will be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

§ 10.151 Depositions.

(a) Depositions for use at the hearing in lieu of personal appearance of a witness before the administrative law judge may be taken by respondent or the Director upon a showing of good cause and with the approval of, and under such conditions as may be deemed appropriate by, the administrative law judge. Depositions may be taken upon oral or written questions, upon not less than ten days written notice to the other party, before any officer authorized to administer an oath or affirmation in the place where the deposition is to be taken. The requirement of ten days notice may be waived by the parties and depositions may then be taken of a witness and at a time and place mutually agreed to by the parties. When a deposition is taken upon written questions, copies of the written questions will be served upon the other party with the notice and copies of any written cross-questions will be served by hand or “Express Mail” not less than five days before the date of the taking of the deposition unless the parties mutually agree otherwise. A party on

whose behalf a deposition is taken shall file a copy of a transcript of the deposition signed by a court reporter with the administrative law judge and shall serve one copy upon the opposing party. Expenses for a court reporter and preparing, serving, and filing depositions shall be borne by the party at whose instance the deposition is taken.

(b) When the Director and the respondent agree in writing, a deposition of any witness who will appear voluntarily may be taken under such terms and condition as may be mutually agreeable to the Director and the respondent. The deposition shall not be filed with the administrative law judge and may not be admitted in evidence before the administrative law judge unless he or she orders the deposition admitted in evidence. The admissibility of the deposition shall lie within the discretion of the administrative law judge who may reject the deposition on any reasonable basis including the fact that demeanor is involved and that the witness should have been called to appear personally before the administrative law judge.

§ 10.152 Discovery.

Discovery shall not be authorized except as follows:

(a) After an answer is filed under § 10.136 and when a party establishes in a clear and convincing manner that discovery is necessary and relevant, the administrative law judge, under such conditions as he or she deems appropriate, may order an opposing party to:

(1) Answer a reasonable number of written requests for admission or interrogatories;

(2) Produce for inspection and copying a reasonable number of documents; and

(3) Produce for inspection a reasonable number of things other than documents.

(b) Discovery shall not be authorized under paragraph (a) of this section of any matter which:

(1) Will be used by another party solely for impeachment or cross-examination;

(2) Is not available to the party under 35 U.S.C. 122;

(3) Relates to any disciplinary proceeding commenced in the Patent and Trademark Office prior to March 8, 1985;

(4) Relates to experts except as the administrative law judge may require under paragraph (e) of this section.

(5) Is privileged; or

(6) Relates to mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party.

(c) The administrative law judge may deny discovery requested under paragraph (a) of this section if the discovery sought:

(1) Will unduly delay the disciplinary proceeding;

(2) Will place an undue burden on the party required to produce the discovery sought; or

(3) Is available (i) generally to the public, (ii) equally to the parties; or (iii) to the party seeking the discovery through another source.

(d) Prior to authorizing discovery under paragraph (a) of this section, the administrative law judge shall require the party seeking discovery to file a motion (§ 10.143) and explain in detail for each request made how the discovery sought is necessary and relevant to an issue actually raised in the complaint or the answer.

(e) The administrative law judge may require parties to file and serve, prior to any hearing, a pre-hearing statement which contains:

(1) A list (together with a copy) of all proposed exhibits to be used in connection with a party's case-in-chief,

(2) A list of proposed witnesses,

(3) As to each proposed expert witness:

(i) An identification of the field in which the individual will be qualified as an expert;

(ii) A statement as to the subject matter on which the expert is expected to testify; and

(iii) A statement of the substance of the facts and opinions to which the expert is expected to testify,

(4) The identity of government employees who have investigated the case, and

(5) Copies of memoranda reflecting respondent's own statements to administrative representatives.